

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

May 1985 OGE Ethics Newsgram

FROM:

EXTENSION

NO.

Assistant General Counsel

DATE 28 June 1985

TO: (Officer designation, room number, and building)

DATE

OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

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Please take note of "Review of Public Financial Disclosure Reports-A Checklist" and "Some Thoughts on 18 U.S.C. §208."

cc: All Panel Members

ETHICS NEWSGRAM

Vol. 2., No. 2

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May 1985

Annual SF 278's Due This Month

Review of Public Financial Disclosure Reports—A Checklist

The annual Public Financial Disclosure Reports (SF 278's) were due by May 15. In several previous issues of the *Ethics Newsgram* we provided you with helpful hints as to what and how financial interests and arrangements should be reported on the SF 278. In this issue we would like to address the process involved in reviewing the reports by providing you with a step by step checklist. Some of the "old salts" have probably been following these steps for years (we hope!), but such a checklist should be of value to the newer reviewing officials by providing them with the fundamental steps necessary for doing effective reviews. Accordingly, here is the checklist for use in reviewing SF 278's:

General

- The last SF 278 required to be filed should be compared with the current SF 278 throughout the review process.

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- The appropriate reporting status should be indicated in the "Reporting Status" block.
- The date of the appointment should be indicated.

Schedule A

- The questions at the top of the schedule should be answered. Where an interest in or qualified, and/or fully trust is indicated, the interest should be disclosed in the portion of the schedule required.
- The first question at the top of the schedule should be answered. If the answer to the first

question is "Yes," the second question should be answered. If the answer to the second question is "No," the interests or liabilities should be reported.

- Where unearned income is reported (i.e., dividends, rent, interest, and capital gains), a category of value of an interest in property should be reported, and vice versa. Exceptions to this would include: (1) interest income having a category of amount of \$101-\$1,000 where the missing property interest is **very** obviously a savings account, money market mutual fund, etc. (with the presumption that the account or fund has a value of \$5,000 or less); (2) a sale of the missing property interest is reported on Schedule B of the current or a previous report; or (3) the property interest for which income is missing is **very** obviously not an income-generating property (e.g., a lot held for investment purposes).
- Where interests in property are reported, valuation methods should be indicated and, where "C" is indicated, the date of purchase should be indicated.
- Where "Other" income is indicated, the amount should be indicated.

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Some Thoughts On 18 U.S.C. § 208

In view of the May 15 filing deadline and ensuing review of the SF 278's, we are setting forth for you some of the more salient aspects of 18 U.S.C. § 208. Section 208 of title 18, United States Code, prohibits Federal employees from participating personally and substantially in any particular matter in which, to their knowledge, they, their spouse, minor child, partner or organization in which they are serving as an officer, director, trustee, partner, or employee, or with which they are negotiating or have any arrangement concerning prospective employment, have a financial interest. The financial interest can be minimal. For example, the ownership of one share of stock by a Federal employee in a company seeking a license from an agency in which the employee has responsibility for awarding the license would constitute a violation of 18 U.S.C. § 208. When the statute was being debated in 1962, Congress turned down a proposal that the statute should apply only if the employee had a substantial economic interest in the particular matter.

Unlike § 207 of title 18, United States Code, the "particular matter" under § 208 is not limited to matters involving a specific party or parties. As a consequence, § 208 covers not only specific claims and contracts but also rulemaking and policy determinations. Normally, general rulemaking or general policy determinations will not be considered to be within the prohibition of § 208 unless they would have a direct and predictable effect upon the financial interests of the employee. This could occur if a sufficiently small and distinct group

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Pat K
This seems to answer the question we were recently asked. We should distribute this to the Panel.
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Managing an Ethics Program in a Large Civilian Agency

By Darrel J. Grinstead

Assistant General Counsel, Business and Administrative Law Division
and Designated Agency Ethics Official, Department of Health and Human Services

Managing an ethics program in a large agency such as the Department of Health and Human Services presents a unique set of challenges. Difficulties are presented not only by the large number of employees in the agency but also by the wide variety of programs and activities over which those employees have responsibility. Of the roughly 130,000 employees in HHS, over 12,000 are required to file confidential financial disclosure reports and 1,600 are required to file public Executive Personnel Financial Disclosure Reports (SF 278's). Their responsibilities include such diverse activities as the regulation of food and drug companies, the administration of large fiscal intermediary contracts under the Medicare program, adjudication of disability claims, and daily contact with members of the general public in Social Security district offices.

Each of these programs presents a separate set of problems under the Ethics in Government Act and Executive Order 11222. The challenge is to establish an ethics program that meets the needs of each program and its associated personnel and, at the same time, complies with the standards of accountability established by the Office of Government Ethics and carried out through the delegated authority of a single Designated Agency Ethics Official.

When the Ethics in Government Act was enacted in 1978, we determined that the increased accountability required for an agency ethics program under that Act could best be achieved through delegations of authority that would integrate the ethics responsibilities into the managerial and administrative framework of each of the subagencies of the Department. Rather than attempting to implement the Act through a separate and independent staff office (such as through the

then-existing Deputy Ethics Counselors in the Office of General Counsel), each component of the Department was directed to nominate to the Designated Agency Ethics Official a management official at the SES level to be designated as Deputy Ethics Counselor for that component. Thus, over 30 Deputy Ethics Counselors were delegated the authority to review SF 278's and to provide ethics counselling to executives and other employees within subcomponents of the Department.

This arrangement has the advantage not only of spreading the workload in a manageable fashion, but also of assuring that each ethics counselor has the necessary familiarity with the programs and responsibilities of the employees who report to him or her to make meaningful judgments regarding potential conflicts of outside interests with official responsibilities. Staff support for each Deputy Ethics Counselor is provided through the servicing personnel office of each component. Individu-

selling has been delegated to line management officials, the Assistant General Counsels and Regional Attorneys conduct a secondary review of the forms and provide a back-up source of ethics advice. This arrangement provides for an independent review of financial disclosure reports and provides the Designated Agency Ethics Official a means within his own staff organization to supervise ethics matters. This independent review has also been effective in achieving uniformity in the application of ethics standards throughout the Department.

The second means we have adopted to coordinate the ethics program is to offer standardized instructional programs and periodic training for all Deputy Ethics Counselors. We conduct an annual workshop for all Deputy Ethics Counselors to disseminate new information, review procedures, and provide training on general standards of conduct principles. A digest of ethics opinions by the Office of General Counsel and

Deputy Ethics Counselors is circulated semi-annually to all ethics counselors in the Department. We are currently preparing an index of these digested opinions to aid ethics counselors in their research on ethics matters.

... we determined that the increased accountability required for an agency ethics program under (the Ethics) Act could best be achieved through delegations of authority that would integrate the ethics responsibilities into the managerial and administrative framework of each of the subagencies of the Department.

als in these offices are trained in the procedural and substantive requirements of the ethics statutes and regulations and they often assist the Deputy in the review of financial disclosure forms and in counselling employees on ethics matters.

The principal difficulty in running a decentralized ethics program is ensuring accountability and full compliance with all the technical and substantive requirements of the ethics statutes and regulations. We have adopted a number of mechanisms to deal with this problem. First, although authority to review SF278's and to provide ethics coun-

Given the large number of both public and confidential financial report filers in the Department, ensuring the timely and accurate filing of all reports is a continuing problem. We have had more success in achieving timely filing in the Executive Personnel Financial Disclosure system than in the confidential reporting system. Since SES and Schedule C appointments are controlled by a central office in the Office of the Secretary, it was a fairly simple matter to establish a computer program to provide a list of all executive personnel required to file SF 278's. The computer provides a print-out of all filers within

Travel

Some Reminders on Travel Expenses

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Managing an Ethics Program

the responsibility of each Deputy Ethics Counselor. The list is prepared annually and supplemented periodically as necessary when new filers are added to the roles. This master list of filers is useful in enabling the Designated Agency Ethics Official to determine that the required reports have been obtained from everyone in the Department who is required to file.

Keeping track of 12,000 confidential report filers and several hundred reviewers of these forms has been a different matter. We are currently working to improve that system through a closer tracking of the delegations of authority to review these forms, closer scrutiny over the designation of covered positions, and improved status reporting procedures.

Another challenging aspect of the Designated Agency Ethics Official's job in a large agency is to ensure that each component of the Department is providing orientation and training in the standards of conduct for its employees. In a large and diverse department like HHS, training resources vary widely. I have encouraged the efforts of the Personnel Officers in the various divisions and have asked all Deputy Ethics Counselors and OGC personnel involved in the ethics program to provide whatever assistance they can in this area. Specific orientation and training requirements are included in the Department's Personnel Manual, and the Department has developed an Instructor's Guide on Standards of Conduct which can be used or adapted by each of the subagencies.

In this era of personnel cutbacks and reduced hiring, formal orientation programs for new employees often fall into a state of neglect. We have reemphasized to each of the Department's personnel offices the need to provide specific information on federal ethics requirements as employees are sworn in. Since the average new employee will not have the time or inclination to wade through pages of standards of con-

duct regulations, we have developed an illustrated pamphlet which digests the standards. We have also developed a two-page Ethics Overview for new SES appointees. I have advised Deputy Ethics Counselors to take advantage of the review of new entrant and termination reports to personally discuss conflict of interest matters with new and departing SESers.

The foregoing has been a brief discussion of the difficulties encountered in managing an ethics program in a large agency and of the means we have adopted to overcome those difficulties. We have found over the last six years that as an ethics program develops and as more and more officials become part of that program, the process generates a momentum of its own. Hopefully, the concept of ethics in government is gradually evolving from a specialized and compartmentalized responsibility into an everyday part of the operations of the agency. At that point we are on the right track.

First, even though the donor is an organization determined by the IRS to fall within the terms of 26 U.S.C. § 501(c)(3) and thus covered by 5 U.S.C. § 4111, an agency may still determine, using the regulations at 5 C.F.R. § 410.701 *et seq.*, that an employee should not accept travel reimbursements from that donor. For example, an employee is responsible for reviewing grants to or grant applications from a university, a "501(c)(3)" organization. The university asks the employee to attend a meeting and speak about the agency's grants process. The employee's direct involvement with the university in his official capacity creates such a degree of conflict that the agency should not permit the employee to accept. If the agency believes the employee should attend, the agency should pay for the travel expenses and thus protect the integrity of its grants program. If another employee of the agency who has no

direct official involvement with the university is asked to attend, the agency could, although it need not, determine that this does not create the same direct conflict and, therefore, could allow the employee to accept pursuant to 5 U.S.C. § 4111 and the implementing regulations. The agency should avoid allowing acceptance in any instance where the travel expenses would ultimately be paid from the grant given by the agency.

Second, while we have no statutory or regulatory basis on which to say that this is required, we believe for purposes of good government that agencies should take into consideration any inherent conflicts when determining whether to accept travel expenses under their own statutory gift acceptance authority. Simply because there is authority under which agencies could accept should not mean that agencies should always accept. Applying the same considerations used in evaluating "501(c)(3)" offers would certainly be appropriate. Further, if agency personnel engage in soliciting such official travel reimbursements, the standards of conduct may become involved, especially if decisions regarding who receives agency services start turning on who can pay.

* This memorandum is available from OGE for any who wish a copy. Please refer to 84x5 in making your request.

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Disclosure Reports—A Checklist

- Where a paid position is reported on Schedule D under "Positions Held," the income should be reported as "Other" income if it is \$100 or more.
- Where any type of employment relationship involving a financial interest (e.g., a pension) is reported on Schedule D under "Relations With Other Employers," the income and/or property interest should be reported unless not otherwise reportable.
- Where a purchase transaction is reported on Schedule B and no subsequent sale or exchange of the property interest had occurred prior to the end of the reporting period, the property interest and any income should be reported unless not otherwise reportable.
- Where a sales transaction is reported on Schedule B, any capital gains income exceeding \$100 and attributable to the reporting period should be reported.

Schedule B

- As a result of a comparison between Schedule A of the current report and Schedule A of the last required report, where a property interest was reported on the last report but not on the current report, a sales transaction should be reported. Where a property interest was not reported on the last report but is now being reported, a purchase transaction should be reported. Exceptions to this would include: savings accounts, money market mutual funds, receivables which have been paid off, bonds which have been redeemed, transactions of \$1,000 or less, or property interests whose values fluctuate above and below \$1,000 from one reporting period to the next.
- Where a purchase, sale, or exchange transaction is reported, the column in which the type of transaction is indicated should correspond to the column in which the date of the transaction is indicated.
- Where capital gains income is reported on Schedule A, a sales transaction should be reported. Exceptions to this would include: (1) a sale for \$1,000 or less; (2) a transaction which occurred in another reporting period; or (3) capital gains income generated

by a mutual fund (as opposed to being generated by the sale of a mutual fund).

Schedule D

- Any liability, which is otherwise reportable, which exceeded \$10,000 at any time during the reporting period should be reported along with the date, interest rate, and term.
- As a result of a comparison between Schedule D of the current report and Schedule D of the last required report, where a filer reported on the last report resigning from a position during a period of time which coincided with part of the current reporting period (January 1—May 15), the position should also be reported on the current report.
- Where earned ("Other") income is reported on Schedule A, the position should be reported. Exceptions to this would include a filer who terminated from the position prior to the beginning of the reporting period or a position which was that of a limited partner.
- Where a financial interest involving an employment relationship (e.g., deferred compensation) is reported on Schedule A, the interest should also be reported as an employment relationship.

This checklist is not intended to be all inclusive and its use, of course, assumes a thorough understanding of the financial disclosure requirements contained in the Ethics in Government Act of 1978, as amended, the implementing regulations at 5 C.F.R. Part 735, the instructions accompanying the SF 278, and the aforementioned helpful hints articles in the **Newsgram**. Furthermore, additional information should be obtained from the filer as needed.

This checklist applies to the June 1981 revision of the form. We will supplement this checklist in a subsequent issue of the **Newsgram** to accommodate the new SF278 after it becomes available.

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Some Thoughts on 18 USC § 208

of persons or entities would be affected by the rule or policy.

Section 208(b) provides for two different types of exemptions which would permit an employee to participate in matters in which he or she would otherwise be required to be disqualified. Subsection (b)(1) authorizes an exemption where the official responsible for the employee's appointment determines that the financial interest involved is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect from the particular employee involved. This exemption can be granted to a specific employee and should be in writing.

Subsection (b)(2) authorizes an exemption if the agency determines that the financial interest is too remote or too inconsequential to affect the integrity of the services of the agency's employees. Pursuant to (b)(2), many agencies have exempted the financial interests of their employees in widely diversified mutual funds. This exemption must be published in the **Federal Register**.

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OGE Personnel Notes

In March Don Campbell, our Chief Counsel, also assumed the title of Deputy Director.

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